No. 4057

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSEN and ED. WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

E. G. DAVIS,
United States Attorney,

JOHN H. McEVERS,
Assistant United States Attorney,
Attorneys for Defendant in Error.

HAWLEY & HAWLEY, and
J. R. SMEED,
Attorneys for Plaintiffs in Error.

CLAUDE W. GIBSON, and
WILLIAM HEALY,
Of Counsel for Plaintiffs in Error.

Filed....., 1923

.....Clerk.

CAPITAL NEWS PUBLISHING CO., BOISE

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSEN and ED. WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

E. G. DAVIS,
United States Attorney,

JOHN H. McEVERS,
Assistant United States Attorney,
Attorneys for Defendant in Error.

HAWLEY & HAWLEY, and
J. R. SMEED,
Attorneys for Plaintiffs in Error.

CLAUDE W. GIBSON, and
WILLIAM HEALY,
Of Counsel for Plaintiffs in Error.

Filed....., 1923

.....Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSEN and ED. WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

STATEMENT OF THE CASE.

The statement of the case as made by the plaintiffs in error is so little calculated to give this Court any light whatever as to the facts on which the rulings of the trial court, here complained of, were based, that we find it necessary at the outset to disregard practically in its entirety the statement of opposing counsel and to set out somewhat at length the actual facts and circumstances constituting the case.

The plaintiffs in error were indicted with five others.

One of these, Edith Sorensen, took to her bed during the trial and no verdict was returned as to her.

Another, J. H. Evans, was never arraigned but was called as a witness for the Government on the trial of the case.

Another, Ed. Hill, was dismissed from the indictment on motion of the Government before the case went to the jury.

Another, Henry Griffiths, Chief of Police of Boise, was acquitted by the jury.

Another, Ed Kemp, was convicted along with the plaintiffs in error but he did not appeal and entered immediately upon the service of his sentence.

The personnel of the plaintiffs in error is as follows:

H. Goodfriend was a well known physician of Boise, Idaho.

James D. Agnew was the sheriff of Ada County, Idaho, in which the City of Boise is located.

Sylvester Kinney was Sheriff Agnew's office deputy.

Carl H. Sorensen, together with Edith Sorensen, his wife, was, at the time of the indictment, operating a rooming house in Boise known as the Vernon Hotel.

Ed Ward was a taxicab driver who roomed at the Union Rooms in Boise.

The indictment was in six counts.

The first count charged a conspiracy as having been entered into in the City of Boise, Ada County, Idaho, on or about the 1st day of December, 1922, and continuing from that date to the 12th day of February, 1923, between the defendants named above and other persons to the Grand Jurors unknown, for the purpose of possessing moonshine whiskey for sale in violation of law.

The second count similarly charged a conspiracy to sell moonshine whiskey at wholesale and retail in violation of law.

The third count similarly charged a conspiracy to manufacture moonshine whiskey in violation of law.

The fourth count charged the defendants with unlawfully having in their possession a certain still and distilling apparatus and all necessary accessories set up and ready for operation without first having registered the same with the Collector of Internal Revenue for the District of Idaho in violation of Section 3258, R. S.

The fifth count charged the defendants with carrying on the business of a distillery without having given a bond and with intent to defraud the United States of the tax on the spirits distilled by them in violation of Section 3281 R. S.

The sixth count charged the defendants with making and fermenting in a building and on premises other than a distillery, duly authorized accord-

ing to law, certain mash, wort and wash fit for distillation and designed and intended for the production of spirits and alcohol in violation of Section 3282 R. S.

Dr. Goodfriend occupied as offices two rooms on the fifth floor of the Empire Building in Boise, Idaho. One of these rooms, referred to in the testimony as the inner or private office, was located in the southeast corner of the building. Dr. Goodfriend's other room immediately adjoined the inner office on the north. Immediately to the west of Dr. Goodfriend's inner office was a room used as an office by Guy Curtis and immediately to the west of this was another room used by Mr. Curtis and his wife as a private sleeping room. Between the office of Guy Curtis and the inner or private office of Dr. Goodfriend was a communicating door which Mr. Curtis kept locked on his side, but which Dr. Goodfriend did not lock on his side. (Tr. p. 128). There were two cracks in this door which permitted a person in the office of Mr. Curtis to see a considerable part of the space in Dr. Goodfriend's inner office. One of these cracks at the top of the door was almost half an inch wide for several inches and the other along the side of the door was probably three-eighths of an inch wide. Through these cracks it was possible to hear a conversation carried on in Dr. Goodfriend's office whenever this was in ordinary conversational tones. (Tr. pp 128, 129).

In the early part of December, Mrs. Curtis, while

in her husband's office adjoining the private office of Dr. Goodfriend, chanced to overhear a conversation concerning a still. Becoming interested in the conversation, she moved to the door and listened and then stood on a chair and found that by looking over the top of the door she could see the parties to the conversation. These she recognized as Dr. Goodfriend and a man whom she later identified as Ed Kemp, one of the convicted defendants. This conversation concerned the setting up of a still, the materials needed to operate it and ended in Goodfriend giving to Ed Kemp the sum of $20.00 with which to purchase necessary materials for the operation of the still. (Tr. pp. 129, 130).

Shortly thereafter Mrs. Curtis heard a second conversation concerning the operation of this still and recognized the participants as Dr. Goodfriend and Sheriff Agnew. (Tr. p. 131). After discussing difficulties entailed in the operation of the still and the necessity for additional barrels, Dr. Goodfriend asked Sheriff Agnew if he could not help him in getting them, to which he said he thought he could. (Tr. p. 131). The conversation then drifted to a number of places that Dr. Goodfriend thought should be cleaned up and he told Sheriff Agnew that he wanted him to be the leader in this cleaning-up process and to get some of the credit for such activity. (Tr. p. 131).

Later in December, 1922, Mrs. Curtis overheard another conversation between Sheriff Agnew and

Dr. Goodfriend in which they discussed the profit so far realized and the amount to be expected if their venture could continue in successful operation. (Tr. p. 132).

About this time, Mrs. Curtis reported to the Federal Prohibition Office what she had overheard in Dr. Goodfriend's office and was instructed by Mr. McEvers, who was then, as now, an Assistant United States District Attorney, to take notes of such conversations as might be overheard touching this still and its operation. (Tr. pp. 133, 203, 217).

Following the receipt of information as to the matters which were transpiring at Dr. Goodfriend's office, the Government, through the office of the Federal Prohibition Director, and under advice of the district Attorney's office, took charge of the case which was developing and posted at various times witnesses in the office room of Mr. Curtis. In this way it was able to observe the formation, development and fruitation of the conspiracy charged in the indictment. This is believed to be one of the comparatively few cases in which direct testimony has been available not only to show the existence of the conspiracy but the part the several members thereof were actually playing therein.

It is unnecessary to outline the evidence further than to state that it was sufficient to overwhelmingly establish the following facts:

1. That Dr. Goodfriend assumed the role of the acting and directing head of the conspiracy for the

manufacture, possession and sale of moonshine whiskey, and that the principal meeting place of the conspirators was in his inner office on the fifth floor of the Empire Building in Boise, Idaho;

2. That the conspirators set up and operated a large still on a place owned by J. H. Evans of Gooding, Idaho, outside the limits of Boise City and two or three miles from the center of the city. This place immediately adjoined a lot owned by Dr. Goodfriend and on which he resided. The Evans place was rented by Dr. Goodfriend and the still was operated by the convicted defendant, Ed Kemp, who is not one of the plaintiffs in error;

3. That the moonshine whiskey manufactured at the Evans place was sold and to be sold at the Vernon Hotel and at the Union Rooms in Boise and that Ed Ward, one of the plaintiffs in error, was to be active in the sale of this moonshine whiskey, not only at the Union Rooms, where he was supposed to keep a cache or supply on hand in a room registered under some fictitious name, but also to engage in certain wholesale operations and to establish what Dr. Goodfriend referred to as "a gallon route". (Tr. pp. 162, 163).

4. That Sheriff Agnew was supposed to have made arrangements with the Federal Prohibition officers, under which he would be informed of every application for a search warrant and, in effect, to be taken in on every contemplated raid by them. In this way, he would have advance information of

any contemplated raid on any place where moonshine whiskey made by the conspirators was kept and be able to tip them off prior to the actual raid. At the same time, he was to be active in the enforcement of the prohibition law insofar as other bootleggers were concerned, thus naturally increasing the profits of the enterprise in which he was personally interested. (Tr. p. 131).

5. That his office deputy, Kinney, one of the plaintiffs in error, was taken into the conspiracy by Sheriff Agnew on the theory that he would naturally be in position to obtain advance information on all contemplated raids. Sheriff Agnew took the precaution, on one occasion, when he was leaving town for a few days, to tell the federal prohibition people that if they wanted the aid of the office in obtaining any search warrants while he was out of town, not to go to his chief deputy, Robinson, but to go to Kinney, his office deputy. (Tr. p. 320).

Each of the plaintiffs in error was convicted on all six counts of the indictment. (Tr. pp. 49, 50). The defendant, H. Goodfriend, was sentenced to be confined in the United States penitentiary at McNeil Island, Washington, for a term of fifteen months and to pay a fine of $2,000.00. The defendant, J. D. Agnew, was sentenced to be confined in the jail of Canyon County, Idaho, for a period of ten months and to pay a fine of $1,000.00. Each of the remaining plaintiffs in error were sentenced

to be confined in the jail of Canyon County for a term of six months and to pay a fine of $500.00.

As we understand the position of counsel for plaintiffs in error, they do not contend that the evidence was insufficient to sustain the verdict insofar as the conspiracy counts of the indictment are concerned, but merely question the sufficiency of the evidence to sustain the verdict as to the last three counts of the indictment.

BRIEF OF THE ARGUMENT.

"An application for a bill of particulars is addressed to the sound discretion of the trial court and is not subject to review."

Knauer vs. United States, 237 Fed. 13, 14;

United States vs. Pierce, et al., 245 Fed. 889, 890;

United States vs. Youled, 253 Fed. 241.

"When there are several charges against any person or persons for the same act of transaction or two or more acts or transactions connected together, the whole may be joined in one indictment in separate counts and a motion to elect on which counts the Government will stand is properly refused.

McGregor vs. United States, 134 Fed. 194;

Pointer vs. United States, 151 U. S. 396, 38 L. Ed. 208;

Pierce vs. United States, 160 U. S. 355, 40 L. Ed. 454.

Sidebotham, et al., vs. United States, 253 Fed. 418.

"A motion to quash is one addressed to the discretion of the Court and a refusal to permit such motion will not be reviewed in an appellate court."

McGregor vs. United States, 134 Fed. 192;

U. S. vs. Rosenberg, 7 Wall. 580, 19 L. Ed. 263;

Durland vs. United States, 161 U. S. 306, 40 L. Ed. 709;

Andrews, et al., vs. United States, 224 Fed. 419;

Phillips vs. United States, 201 Fed. 262.

"The fact that defendants failed to register a still; that they failed to furnish a bond and that they fermented mash, wort and wash fit for distillation in a building other than a distillery, not duly authorized according to law may be proved by indirect evidence."

McCurry, et al., vs. United States, 281 Fed. 532.

"Where a general judgment is imposed upon conviction on several counts and is not imposed under any single count nor in excess of what may have been given on any single count, the verdict and judgment will be upheld if the evidence was sufficient to sustain the conviction on any one count."

Wetzel vs. United States, 233 Fed. 984.

"An affidavit taken before a Notary Public in connection with criminal prosecutions in Federal Courts cannot be considered by the Court as any evidence of the facts therein stated."

United States vs. Schallinger Produce Company, 230 Fed. 293;

United States vs. Curtis, 107 U. S. 671, 673, 27, L. Ed. 534.

"Protection accorded by the Fourth Amendment against illegal search and seizure cannot be availed of by a co-defendant of the person whose premises were searched."

Haywood vs. United States, 268 Fed. 803;

Lusco vs. United States, 287 Fed. 69.

Plaintiffs in error contend that the use of notes by a witness in the Federal Courts is limited to such use as may be necessary for the purpose of refreshing recollection. The record shows unmistakably that that was the only use of notes permitted by the trial court in this case.

ARGUMENT.

The first assignment of the plaintiffs in error is to the effect that the Court erred in denying the motion for a bill of particulars made and heard prior to the trial of said cause. Evidently they have little faith in this assignment for the reason that they have not argued it in their brief. It is, how-

ever, referred to in their statement of the case and it is there suggested that the denial of the bill of particulars in toto was an abuse of the discretion on the part of the trial court. It is familiar law, we think, that an application for a bill of particulars is addressed to the discretion of the trial court and that its action thereon is not subject to review.

Knauer vs. United States, 237 Fed. 13, 14;
United States vs. Pierce, et al., 245 Fed. 889, 890;
United States vs. Youled, 253 Fed. 241.

In considering the other assignment in this case, we shall, for convenience, follow as closely as possible the order of presentation adopted by counsel for plaintiffs in error. We therefore consider,

I.

ASSIGNMENTS 2 AND 3. These are directed to the Court's refusal to sustain a motion requiring the Government to elect between the conspiracy counts of the indictment and those based on the Internal Revenue laws and to the Court's refusal to permit a motion to quash the indictment. (Tr. pp. 52-54). Section 1690 U. S. Compiled Statutes (Section 1024, R. S.), reads as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which

> may be property joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

It is too clear for argument that we have in the indictment under consideration several charges against the defendants for the same acts or transactions or for two or more acts or transactions connected together. The testimony necessary for the proof of the conspiracies charged in the indictment was competent and necessary for the proof of the violations of the Internal Revenue statutes charged in the last three counts of the information. Under these circumstances, there could, of course, be no question of the propriety of the joinder. The law on this point is well stated by the Circuit Court of Appeals of the Fourth Circuit in the case of McGregor vs. United States, 134 Fed., at page 194:

> "The action of the Court below in refusing to require the United States to elect under which counts of the indictment the trial should proceed was without error. The offenses charged were, as has been shown, directly connected together, and it was quite apparent to the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the Court, and are not reviewable on writ of error. Pointer vs. United States, 151 U. S. 396, 38 L. Ed. 208; Pierce vs. United States, 160 U. S. 355, 40 L. Ed. 454."

The same doctrine was announced by this Court in Sidebotham, et al., vs. United States, 253 Fed., at page 418, where the Court used the following language:

> "The scheme and device to defraud as charged in the indictment and the conspiracy to commit that offense, grew out of the same transaction, and were so connected together that the evidence to sustain one charge was evidence in support of the other charges, except to establish the conspiracy count, it was necessary to prove the conspiracy. Such charges may be joined under the provisions of Section No. 1024 of the Revised Statutes. (Comp. St. 1916, Sec. 1690)."

As to the action of the Court in refusing defendants' permission to withdraw their plea of guilty and to interpose a motion to quash the indictment it is sufficient to say that this matter was one entirely within the sound discretion of the Court and is not reviewable by an appellate court.

> "It is well to note the fact that a motion to quash is one addressed to the discretion of the Court, and that in the courts of the United States, at least, the refusal to quash will not be reviewed in an appellate court."
>
> McGregor vs. United States, 134 Fed., at page 192.

Citing United States vs. Rosenberg, 7 Wall, 580, 19 L. Ed. 263; Durland vs. United States, 161 U.

S. 306, 40 L. Ed. 709, 10 Ency. P. and P. 567, and cases cited.

The same holding was made by this Court in the case of Andrews, et al., vs. United States, 224 Fed., at page 419. The same holding was also made by the Circuit Court of Appeals for the Eighth Circuit in the case of Phillips vs. United States, 201 Fed., at page 262.

In discussing these same assignments the plaintiffs in error contend that their conviction on the last three counts of the indictment was not sustained by the evidence; that is to say, it is contended that the Government offered no evidence tending to show that the defendants failed to register their still, that they failed to furnish a bond, and that there was no showing as to the legal status of the building in which the distilling was carried on. In answering this suggestion we content ourserves with referring to the case of McCurry, et al., vs. U. S., 281 Fed. 532. That case was decided by this Court, and the very question here raised was passed upon in that case. At pages 533 and 534 the Court said:

> "It is next assigned as error that the lower Court erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond. The Court instructed the jury that the prosecution need only prove the circumstances from which can be presumed lack of registry

and bond filed, whereupon the burden shifted to defendants to prove registration and filing of bond.

"A circumstance of great significance against the registration of the still and filing of a bond by the appellants was the fact that they made no claim of ownership, interest in, or knowledge of the still. This was in accordance with their plea of not guilty, and was a practical admission that they had not registered the still, nor given bond therefor. This fact was brought to the attention of the appellants by the Court in its decision denying the motion for a new trial, in response to which they remained silent. The absence from the case of any claim of ownership, intent, interest in, or knowledge of the still, on the part of the appellants, was a material circumstance, sufficient to shift the burden of proof, and justify the instruction of the Court to the jury that the burden was upon the defendants to prove the registration of the still and filing of bond. If the appellants had registered the still and filed the bond, they knew that fact better than any one else, and could have so stated at any time during the proceedings against them."

In the case at bar the defendants all pleaded not guilty and all except the defendant Kemp denied any knowledge, whatever, of the installation of the still and its operation. They made no claim of ownership or interest in the still, and denied all knowledge of its location, its operation and the sale or disposal of its products. In view of these facts, the rule announced in the McCurry case just cited has full application.

But even though it should be held that the evidence was insufficient to sustain the conviction upon any one or all of the last three counts of the indictment, the sentence imposed by the Court cannot be disturbed if a conviction on any count of the indictment is upheld. The judgment was not apportioned to any count. It was general in its terms and applied to all the counts on which plaintiffs in error were convicted and it did not exceed that which might have been imposed upon conviction under any single count.

Wetzel vs. United States, 233 Fed., page 984.

II.

ASSIGNMENTS 48 AND 49. What has been said under sub-head I is sufficient to dispose of the argument under assignments 48 and 49, except that it should be added that as we read the decision in the case of U. S. vs. Stafoff, 67 L. Ed. 211, that case fails to hold, as contended by counsel for plaintiffs in error, that one cannot be convicted under both the National Prohibition Act and the Revenue laws for the same act. However that may be, it cannot be contended here that they were convicted under both Acts for one and the same offense. It is clear, however, that the acts established in evidence were sufficient to prove, beyond any reasonable doubt, the several conspiracies alleged, and also the vio-

lation of the Revenue Laws charged in the last three counts of the indictment.

III.

ASSIGNMENT No. 47. What has heretofore been said applies to this assignment, and need not be repeated.

IV.

ASSIGNMENTS Nos. 10, 11, 12, 13, 14 15. The next matter discussed in the brief of plaintiffs in error relates to certain alleged errors committed by the Court in admitting in evidence certain intoxicating liquor and other articles obtained by officers of the Government during a search of the rooms occupied by defendants, Carl Sorensen and Edith Sorensen in the Vernon Hotel. It was contended that this search was illegal and that the evidence should have been excluded. It will be recalled that Carl Sorensen and Edith Sorensen were the proprietors of the Vernon Hotel. A search of this hotel had been made under a search warrant, procured on an affidavit signed by Paul Reynolds, a prohibition agent. Based upon the evidence thus obtained, an information was filed against these defendants in the United States District Court for the District of Idaho, charging them with the possession of intoxicating liquor. A petition, verified by the defendants before a notary public, and supported by affidavits subscribed before a notary public, was

filed asking for the return of the seized property. An order to show cause was issued and served on the prohibition director. He appeared in obedience to the order and filed a demurrer to the petition and to the showing in support thereof. This demurrer was sustained by the trial court. When the two Sorensens were later indicted in this case, it was stipulated that the record concerning the petition and the proceedings had thereon should be made a part of the record in this cause. This stipulation was approved by the trial judge. (Tr. pp. 27-49).

Plaintiffs in error now contend that the trial court should have declared the search of the Sorensen premises illegal, and refused to permit the introduction of the evidence secured thereby. As previously stated, the trial court sustained the Government's demurrer to the petition. (Tr. pp. 47-49). It is true, as pointed out on page 21 of the brief of plaintiffs in error, that the trial court, in sustaining the Government's demurrer, did not expressly pass upon the contention of the Government that the showing made by the Sorensens for the return of the confiscated liquor and other property was insufficient, by reason of the fact that the affidavits of Carl and Edith Sorensen (Tr. p. 33), intended as a verification of the petition, was not made before an officer authorized to administer oaths in a judicial proceeding in a United States court. The same objection was raised to the sup-

porting affidavits (Tr. pp. 38-45), as these affidavits were subscribed and sworn to before a notary public. It was then, and is now, the position of the Government that the petition as verified, and the supporting affidavits could not be considered as offering any evidence, whatever, of the alleged facts therein recited. This question was distinctly passed upon by this Court in the case of U. S. vs. Schallinger Produce Company, 230 Fed. at page 293, where the Court, after referring to certain affidavits which were relied upon in that case, used the following language:

> "The question therefore arises: Can these affidavits taken before notaries, be considered by the Court? I am of the opinion that they can not."

The Court at this point quotes extensively from U. S. vs. Curtis, 107 U. S. 671, 673; 2 Sup. Ct. 507, 509; 27 L. Ed. 534, and then follows such quotation with this sentence:

> "It follows from this decision that a notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions.
>
> "This Court will, therefore, refuse to accept these documents taken before notaries as evidence, and the search can not, therefore, for want of any affirmative showing, be held to be illegal."

The search warrant complained of was issued upon the affidavit of Paul Reynolds, set forth in

the complaint at pages 35 and 36. Much space is devoted in the brief of plaintiffs in error to arguing the insufficiency of this affidavit. The trial court passed over without question the contention that the affidavit was insufficient, and confined his discussion to the question of whether the rooms occupied by the Sorensens in the Vernon Hotel were used by them exclusively as their own private apartment and as their residence in such manner as to constitute the same a "private dwelling" within the meaning of the National Prohibition Act. Doubtless he assumed, as this Court will doubtless find, if such finding should be necessary, that the affidavit was in fact sufficient. But accepting the affidavits submitted in support of the petition for a return of the seized liquor at their face value, notwithstanding the fact that they had not been sworn to before an officer competent to administer oaths in connection with criminal prosecutions in the United States courts, the trial court was still of the opinion that the showing of fact was not sufficient, and the Government's demurrer was accordingly sustained. At the trial of this case when evidence was being elicited from the witness C. B. Steunenberg (Tr. p. 71), as to what had been found in the search of the rooms occupied by the Sorensens in the Vernon Hotel, objection was made by counsel for the Sorensens to the testimony, on the ground that it had been obtained through the use of an illegal search warrant. The Court thereupon

excused the jury, and after the jury had left the room the Court stated that he would hear the Sorensens on the matter of the admissibility of the evidence secured by the search. The Court said:

> "I will hear the defendants Sorensen, if they desire to be heard in the way of sworn testimony as to the situation there. I will give them an opportunity to be heard now, and before passing upon the matter I shall require them to submit to interrogation by myself as to conditions there. In other words, I am not satisfied with the general statements as made in the application and the showing made in connection therewith, and desire that they submit to cross-examination, or, rather, to examination. Such testimony, however, not to be heary by the jury or used against them in this trial." (Tr. pp. 74-75).

This invitation to furnish additional facts was refused by the Sorensens.

In view of the fact that this Court is now being asked to declare the search warrant illegal, we submit, as an elementary proposition, that this Court must pass upon that request in the light of all the information afforded by the record now before it, and not merely in the light of the information that was before the trial court. This information, discloses that the rooms used by the Sorensens in the Vernon Hotel were not used exclusively as a private residence but that they were used in part "for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house," within the mean-

ing of Section 25 of the National Prohibition Act.

Mr. Steunenberg in describing the Vernon Hotel, testified that on the day of the search he found that there were double doors from the street to the stairway; that there was a small desk in the hallway upstairs, but that there was no office or anything to suggest an office, except the desk in the hallway. He testified that when the doors from the street to the stairway opened, a buzzer rang in Room 2, the buzzer ringing continuously while these doors were open. (Tr. p. 72). In a similar way witness O. K. Nickerson testified that when he first went into the Vernon Hotel he heard a buzzer ring, and immediately saw Mrs. Sorensen coming out of her room. (Tr. p. 82). Similarly, witness Paul Reynolds testified that he noticed a buzzer over the door in Mrs. Sorensen's room, on the inside. He noticed the bizzer ring when the door opened downstairs. (Tr. p. 85). This testimony clearly establishes as a fact in this case that the occupancy of the rooms by the Sorensens had a direct relation to the rooming house enterprise, and that they were connected with, and constituted a part of, such enterprise. Within the reasoning of the trial court, therefore, (Tr. p. 48), the Sorensens' rooms should be "treated as a part of the rooming house business, and not as held exclusively for residence purposes." (Tr. p. 48). The situation here presented, is, therefore, just what the trial court had in mind when he stated, (Tr. pp 48, 49), that while "courts

must carefully protect the home from unwarranted intrusion, * * * * there must be equal concern to see that the provisions of law authorizing searches for contraband liquor are not nullified by cunningly devised schemes by which bootlegging enterprises are given the similitude of private dwellings." Upon the showing thus made by the record now under consideration, the Sorensens' rooms were not used exclusively as dwelling apartments, and the contention that the search warrant was illegal has no foundation in fact.

Finally, it remains to be suggested that even though the search warrant may have been illegal as to the Sorensens, and a violation of their constitutional rights, the Government was, even so, entitled to have the evidence impounded for use against the other parties to the conspiracy whose constitutional rights could in no case have been violated by the search.

Haywood vs. U. S., 268 Fed. 803;
Certiorari denied, 256 U. S. 689.

The point just made, to-wit, that the protection guaranteed by the Fourth Amendment cannot be availed of by a co-defendant, was specifically upheld in the case of Lusco vs. United States, 287 Fed., page 69. The following is taken from the syllabus in that case:

"The protection accorded by the Fourth Amendment against illegal search and seiz-

> ure cannot be availed of by a co-defendant of the person whose premises were searched."

The Court in the Lusco case cited as authority for this holding the case of Haywood vs. United States, supra.

V.

ASSIGNMENTS NOS. 24, 26, 32, 33, 34 and 42. Evidently the plaintiffs in error have but little faith in the assignments here discussed, since they say, on page 38 of their brief:

> "These matters may be, and no doubt are, comparatively unimportant as compared with the more outstanding features of the case; but a continuous succession of error, as we believe these matters to be because of their lack of connection, will eventually overload any defendant in any criminal case."

Generally, the objections referred to relate to testimony given as to conversations overheard in Dr. Goodfriend's inner office, and, to a lesser extent, to testimony relating to matters on the outside which was offered for the purpose of connecting up the direct testimony as to the conspiracy; thus showing not only the existence of the conspiracy but its actual operation.

VI.

ASSIGNMENT NO. 44. This assignment is to the effect that the Court erred in sustaining objections to the question of defendants put to the witness

Ernest A. Stoops as to whether he had received any order from Chief of Police Griffiths to protect any rooming houses in Boise, and in sustaining objections to similar questions as to whether the Chief of Police had given instructions not to enforce the liquor laws, etc. This assignment is clearly without merit insofar as this appeal is concerned. Defendant Griffith was acquitted by the jury, and this testimony, or offer of testimony, insofar as it had any value at all, related solely to the acquitted defendant. The exclusion of the testimony could have had no effect on the other defendants.

VII.

ASSIGNMENT NO. 16. In this assignment objection is made to the fact that the Court permitted the witness McCutcheon, a deputy United States Marshal, to testify that he had served abatement papers on the Vernon Hotel on the 30th of January, 1923. This testimony had a direct relation to the proof of the conspiracy itself, for, following the service of the abatement papers, the government was able to prove, by the testimony of witnesses stationed in Mr. Curtis' office, its effect upon the other conspirators, as shown by what went on in Dr. Goodfriend's inner office. (Tr. pp. 191, 286). The evidence was not, therefore, immaterial or unimportant.

VIII.

ASSIGNMENT No. 43. This assignment is to the effect that the Court erred in permitting the plaintiff to cross-examine defendant Griffith concerning his knowledge of the reputation of defendant Goodfriend in the matter of gambling and playing cards. The witness Griffith had admitted going to Dr. Goodfriend's office on various occasions. On cross-examination this defendant was interrogated as to why, being the Chief of Police, he did not require Dr. Goodfriend to come to his office, rather than to go to Dr. Goodfriend's office at the latter's bidding. This question was followed by a question as to whether or not, in so going, he did not know that Dr. Goodfriend was a professional gambler. He stated that he knew he was playing cards, but never could catch him at it, and admitted that he had tried. (Tr. pp. 385 and 386). The interrogation was entirely proper, as showing the possibility of the Chief of Police being a member of the conspiracy which was then on trial.

IX.

ASSIGNMENT No. 17. In this assignment objection is made to the Government's placing in evidence the fact that two newspapers, bearing printed labels containing Dr. Goodfriend's name, were found by the searching officers at the house on the Evans grounds where the still was in operation. In view of the fact that these papers had evidently

been sent through the mails, and that Dr. Goodfriend had rented the place in question from Evans, the evidence was clearly admissible as an incident tending to show Dr. Goodfriend's connection with the conspiracy, and with the operation of the still.

X.

ASSIGNMENTS NOS. 5, 6, 7, 8, and 9. All of these assignments relate in one way or another to testimony concerning the sale of liquor at the Union Rooms. This testimony was directly connected with the defendant Ed Ward. Mrs. Curtis testified that on or about December 28th, while Carl Sorensen was in Dr. Goodfriend's office, Dr. Goodfriend asked: "Have you ever called up Ed to find out whether he wants anything or not?" Mr. Sorensen replied: "No, I haven't just recently, I will call up right now." He called up a number, 3141, asked if Ed was there, and said: "Do you want any of the stuff, Ed?" Witness did not hear the other part of the conversation, but Sorensen then remarked: "Well, you say you want one sack. I will deliver it Sunday morning about ten o'clock." (Tr. p. 132). The number 3141 was the telephone number of Mrs. Henrietta Goldsberry, at 709½ Main Street,—the Union Rooms. (Tr. p. 113). Again, the witness Curtis testified (Tr. p. 169), that Dr. Goodfriend called 3141 and asked for Ed, and told him to come down right away. She further testified that after he came Dr. Goodfriend

told him to put his cache in a room and register that room under a fictitious name; that he should always keep the room registered, and, if necessary, to change the cache three or four times a day, but wherever it was, to keep the room registered under a fictitious name. (Tr. p. 170). In view of this testimony, the sale of liquor at the Union Rooms, where Ed Ward was living, by Etta Goldsberry, one of the conspirators who was, at the time of the indictment, to the Grand Jurors unknown, was clearly competent and proper.

XI.

ASSIGNMENT No. 27. This deals with the refusal of the Court to permit the witness Marie Curtis to be cross-examined concerning the relations of her husband and herself with an organization known as the Ku Klux Klan. There was no reason, whatever, for bringing the Ku Klux Klan, or any other Klan, into the trial of this case, and the references to that organization were clearly made in an attempt to prejudice certain members of the jury. This assignment of error is unworthy of serious consideration.

XII.

ASSIGNMENTS NOS. 38, 39 and 40. These assignments refer to the Court's refusal to permit plaintiffs in error to inquire of the witness Paul Reynolds as to whether he had information concern-

ing sales of liquor in the Vernon Hotel other than that stated by him in the affidavit which he made for the procuring of a search warrant. The inquiry was obviously improper. It was in no sense cross-examination of the witness and this line of questioning was properly excluded by the Court.

XIII.

ASSIGNMENTS NOS. 18 and 45. The witness Paul Reynolds was asked if in procuring the search warrant for the search of the Evans' place where the still was found, he had correctly stated in his affidavit the information upon which he acted. Plaintiffs in error use something like a page of their brief in complaining of the fact that the Court did not allow the witness to answer this question, whereas, the record plainly shows that the question was answered.

> Q. Did you correctly state in the affidavit you made at that time information which led you to make the search out there on the Evans' ranch?
>
> A. Surely.

(Tr. top of page 100).

These assignments insofar as they are otherwise discussed in the brief of opposing counsel are clearly without merit.

XIV.

ASSIGNMENTS NOS. 25, 28, 29, 30, 31, 36, 37 and

41. It is clearly evident from the attention given to these assignments and the earnestness which characterizes the attempt to mislead this Court into thinking that they are of special merit, that these paricular assignments are regarded by plaintiffs in error as the real heart of their case. It can be easily demonstrated, however, that they are without merit. These assignments relate to the use of notes, previously made, by the witness Marie Curtis for the purpose of refreshing her memory while giving her testimony. It will be recalled that she began taking notes on the 29th day of December, 1922, and continued to make notes of conversations as she heard them from that time through to about the 15th day of February, 1923. These notes covered many separate conversations held in Dr. Goodfriend's inner office between the Doctor and other conspirators. It was entirely obvious that without the use of these notes it would be humanly impossible to give the dates on which particular conversations occurred and to name the parties present. The witness testified that she made these notes within a few minutes after hearing the conversations and while they were still fresh in her memory.

Counsel for plaintiffs in error devote several pages of their brief to a discussion of the rules applicable to the use of notes made under circumstances similar to those which existed in this case. After much contending they conclude that the cor-

rect rule is that such notes or memoranda are admissible only for the purpose of refreshing the memory of the witness, and they entirely overlook the fact that the record discloses with unmistakable clearness that that was the only use which the Court at any time sanctioned or permitted. In other words, they overlook the fact that the record shows, beyond any question, that the rule contended for was applied with all the strictness that was humanly possible under the circumstances of the case. Moreover, it is clear that the prosecution never, at any time, attempted to make any other use of these notes than for the purpose of refreshing the memory of the witness.

When this matter first came up, (Tr. p. 133), after developing the fact that notes had been made, the prosecution asked this question:

> Q. Now, referring to your notes *for the purpose of refreshing your memory*, I will ask you to give us what you heard on December 29th?

This matter is next taken up on page 137 of the transcript where the following occurs:

> THE COURT: The notes, of course, are not offered, Mr. Cavaney. There is no offer of the notes.
>
> MR. CAVANEY: Well, she started to read from them, Your Honor, please.
>
> THE COURT: I didn't understand so. Counsel asked her to refer to them to refresh her recollection and she is to testify simply

from refreshing her recollection. *We will not permit her to read the notes, of course.*

The following occurs on page 138 of the transcript:

Q. (By MR. McEVERS): Now, looking at your notes, Mrs. Curtis, for the purpose of refreshing your memory, tell us in substance as near as you can what that conversation was. *Of course, we understand you can't read your notes, but you can refresh your memory.*

A. Yes.

Q. (By THE COURT): Madam, have you refreshed your memory of what occurred by reading your notes over the last few days?

A. Well, I have looked over them, but I have not studied them.

Q. Can't you now without looking at them give us in substance what occurred on this particular day?

A. I believe that I could not.

Q. Very well. *You may glance over them and give us the substance of what occurred.*

MR. McEVERS: If the Court please, may she read a part of them and then give us the substance and then read more, there are some of them quite long, and it will be quite difficult for her to read them all and then relate the conversation?

THE COURT: Yes, as you go from one subject to another you can give us the substance of what was said on that particular subject.

Q. (By MR. McEVERS): Refreshing your memory, will you tell us what was said there at that time?

We now quote from page 154 of the transcript where this question of the use of her notes was again brought up:

> MR. MARTIN: Now, she is giving a statement of things which she says occurred during January, and she is simply reading, that is what we object to.
>
> THE COURT: *I don't understand that she is simply reading them.*
>
> MR. MARTIN: We can see her, Your Honor please. She simply reads like reading a book.
>
> THE COURT: I think it is a proper use of memoranda made at the time. It is a very familiar practice to use memoranda of figures and dates and other matters.
>
> MR. MARTIN: But these are not figures and dates, Your Honor. This is a narrative story that this witness has prepared and written out, and she is sitting here in the witness chair now reading it.
>
> MR. HAWLEY: And not as an assistance for memory, but as a substitute for her recollection.
>
> THE COURT: You may proceed.
>
> MR. McEVERS: Go ahead.
>
> MR. MARTIN: We would like an exception to the ruling of the Court permitting her to read her story.
>
> THE COURT: *The Court is not permitting her to read her story. The record will show that.*

We quote from pages 157 and 158 of the record where the following colloquy occurred:

MR. SMEAD: Now, again, Your Honor, it is more than obvious that the witness is reading a narrative she has written at some time.

MR. McEVERS: She is entitled to refresh her memory from notes, and it is obvious that, running over a period of a month or so, it wouldn't be accurate if she didn't.

MR. SMEAD: She shouldn't read what she wrote.

THE COURT: I think I will permit her to proceed. Counsel are familiar with the necessity of producing, for instance, a short hand reporter, he is permitted to read his transcript generally. Strictly speaking, he can only refresh his memory from it. We all know that he must practically read what he wrote at that time.

On page 161 of the transcript, Mr. Smead ended a long dissertation on the use of notes by a witness with the following remark:

"But all she can do is to read what she wrote about her own impressions."

Whereupon the Court remarked:

THE COURT: *She isn't doing that.* She is being permitted to look at this book just as one is often permitted to use a diary, sometimes that is written up at the end of a day, perhaps not until the day after.

As shown on the same page of the transcript, the Court just immediately thereafter instructed the witness as follows:

> THE COURT: *Just glance over the subject matter, and then as far as you can, give in your own language what occurred when your memory is refreshed as to the particular subject.*

On page 178 of the transcript, the following occurs:

> Q. (By MR. McEVERS): Well, alright, read your notes.

This standing by itself might be somewhat misleading but in view of the limitations placed by the Court upon the use of the notes by the witness, it is entirely clear that the assistant prosecuting attorney at this point was merely suggesting to the witness that she read or glance over her notes for the purpose of refreshing her recollection. That is to say, for the purpose of making such use of her notes only as was permitted by the Court.

It thus appears in no unmistakable terms that the Court as his final direction and his final ruling on the question of the use of these notes instructed the witness as follows:

> *"Just glance over the subject matter, and then as far as you can, give in your own language what occurred when your memory is refreshed as to the particular subject."*

In view of the fact that the record thus shows in the most positive way that the only use made of the notes was such use as plaintiffs in error are here contending for, it is idle to argue this matter

on the theory that any other use was in fact permitted. We are assuming that the record which plaintiffs in error have brought here, and which they thus vouch for as correct, cannot be impeached by arguments of counsel or even positive assertions contrary to what the record itself shows.

ASSIGNMENTS NOS. 30 and 31. These assignments, with reference to the testimony of witness Kuchenbecker, have to do with the same subject matter just discussed with reference to the witness Marie Curtis, that is to say, with reference to the use of notes made by the witness at the time or shortly after he heard certain conversations to which he was permitted to testify. On page 239 of the transcript, after the fact was developed that he had made notes at the time of hearing the conversations or shortly thereafter, the following question was put to the witness:

> Q. *All right, now, using those notes for the purpose of refreshing your memory,* from them, Mr. Kuchenbecker, you may give the substance of the conversation between Dr. Goodfriend and Chief Griffith as you heard it.

On page 252 of the transcript, the following occurs:

> Q. (By MR. GIBSON): Pardon me, Mr. Kuchenbecker. You are reading from your notes, aren't you?
>
> A. Just partly, yes.

Q. Well, you are reading what you are testifying to, you are reading, that is, you are reading all you are testifying to now from your notes, aren't you?

A. Yes, mostly. I—

THE COURT: *Just refresh your memory, Mr. Kuchenbecker.* Can't you tell us a little more in narrative form just what happened?

A. Not and be absolutely sure. I would have to look the notes over in order to—

Q. *Glance over them so as to get the subject matter and then give us the substance of it, what occurred.*

From the foregoing it appears clear that the only use which Mr. Kuchenbecker, as a witness, was permitted to make of his notes was limited by the Court, as in the case of Mrs. Curtis, to such use as was necessary for the purpose of refreshing his memory so that he could testify to the particular conversations which he heard on a particular date. It follows that this testimony was likewise admitted under the very rule for which plaintiffs in error here contend.

ASSIGNMENTS NOS. 36 and 37. These pertain in a similar way to the use of notes made by the witness Paul Reynolds while overhearing conversations between the conspirators or very shortly thereafter. On page 278 of the record, the witness stated:

"I am referring to my notes for the purpose of refreshing my memory."

and the record as given on the following pages 278 to 283 clearly shows that the notes as made by the witness recorded his best recollection, immediately after hearing the conversation, of what occurred therein and were entirely competent for use by him for the only purpose permitted by the Court—the purpose of refreshing his recollection.

Concerning the testimony given by the witnesses Curtis, Kuckenbecker and Reynolds, and particularly with reference to the testimony of Mrs. Curtis, counsel for plaintiffs in error make much complaint over the fact that they only made notes of conversations concerning the subject matter of the conspiracies charged in the indictment, that is, concerning the operations of the conspirators in the making, possession and sale of the moonshine whiskey. As indicated by Mrs. Curtis, (Tr. p. 135), she did not think it necessary or proper to make notes of conversations which she may have heard between Dr. Goodfriend and patients who came into his office. When she ascertained that such conversations were going on she paid no attention to them and only made an effort to record the conversations when they had to do with the subject matter on which she had been requested by the Government to procure evidence.

Counsel say that it is very apparent that she made her notes with the distinct object of being able to convict the defendants. The exact contrary is apparent. Two of the defendants indicted by

the grand jury were Henry Griffiths, Chief of Police of Boise, and Ed Hill, a member of the detective force. It will be recalled that the testimony as to Hill merely disclosed that he had been in Dr. Goodfriend's office and that Dr. Goodfriend had done most of the talking and that Mr. Hill made no reply whatever which would indicate his acquiescence in what Dr. Goodfriend was saying to him. (Tr. p 187). In a similar manner, Mrs. Curtis recorded faithfully the conversation between Dr. Goodfriend and Chief of Police Griffith. Largely, these conversations had to do with matters other than the manufacture and sale of liquor as charged in the indictment. Upon the whole case the Government felt justified at the close of the evidence in dismissing the indictment as to the defendant Hill, and the Chief of Police was the one defendant acquitted by the jury. It is entirely obvious that if Mrs. Curtis had been merely attempting to make a sensational case, she would have been just as anxious to convict these city officers as she could be to convict the county officials and those associated with them. It is apparent, therefore, that if there had been such a desire to convict any one other than on the most truthful testimony, the addition of just a few words with reference to Hill and Griffith would have been sufficient to secure the conviction of both by the jury.

The testimony as given by the witnesses who overheard conversations in Dr. Goodfriend's office

was checked up on the outside in a great many details, as is shown by the record, and the checks always showed that the testimony as given by the witnesses was absolutely correct.

The record cannot be read without the conclusion that the testimony produced on behalf of the Government, while full and convincing, was conservatively correct in every particular.

XV.

ASSIGNMENTS NOS. 21, 22 and 23. These relate to the use of a detectaphone which the prohibition officials had placed in the office of Dr. Goodfriend. As a preliminary to introducing the evidence secured by the use of this detectaphone, the instrument was brought into court and set up so as to illustrate the use that had been made of it and to demonstrate that it was possible by such use to hear what was going on in the room where the receiving part of the instrument had been placed. Upon strenuous objection by plaintiffs in error to the use of this detectaphone, and owing to the fact that no precedent was available which permitted the use of evidence secured in this manner in a Federal Court, it was decided by the prosecution to withdrraw the offer of such testimony in order that no risk might be run of invalidating the Government's case by the introduction of testimony which this Court or the Supreme Court might possibly hold had been improperly secured. The offer

to introduce such testimony and the preliminary preparations for the introduction of such testimony were, of course, made in good faith and the plaintiffs in error are in no position to complain because of the fact that the Government refrained from introducing the testimony procured by use of the detectaphone any more than they would be if the Court had merely sustained permanently their objection to such use as he did temporarily just before the offer of such testimony was withdrawn.

Upon the whole case we submit that the judgment of the trial court should be affirmed in toto.

Respectfully submitted,

E. G. DAVIS,
United States Dist. Atty.

JOHN H. McEVERS,
Assistant U. S. Dist. Atty.
Attorneys for Defendants in Error.